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No. 78-509

In the Supreme Court of the United States

OCTOBER TERM, 1978

28 EAST JACKSON ENTERPRISES, INC.,
Petitioner,

vs.

EDWARD J. ROSEWELL, County Treasurer and Ex-Officio County Collector of Cook County, Illinois, THOMAS M. TULLY, Individually and as Assessor of Cook County, Illinois, and P. J. CULLERTON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a Writ of Certiorari issue to review the unpublished Order of the United States Court of Appeals for the Seventh Circuit entered May 15, 1978, lifting preliminary injunctions and dismissing petitioner's complaints in the consolidated appeals.

OPINIONS BELOW

The unpublished Order of the Court of Appeals of the Seventh Circuit, entered on May 15, 1978 under local Rule 35, has not been and will not be officially reported. Copies of this unpublished Order, the Order denying petitioner's Petition for Rehearing and Rehearing *En Banc*, and the Memorandum Decisions of the District Court granting preliminary injunctions are set out in the Appendix.

JURISDICTION

The unpublished Order of the Court of Appeals was entered on May 15, 1978. A timely filed Petition for Rehearing and Rehearing *En Banc* was denied on June 28, 1978. This Petition is filed within 90 days from the latter date. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in dismissing, under 28 U.S.C. §1341, holding that petitioner had no right, in a state court tax injunction proceeding and an appeal therefrom, brought to ascertain the availability of a plain, speedy and efficient remedy, to make an *England*[1] reservation to preserve its right to return to the District Court, notwithstanding that Court had taken jurisdiction to maintain the status quo, and in aid of its own jurisdiction, while petitioner exhausted its rights of appeal in the State Court.

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[1] *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 11 L.Ed.2d 440, 84 S.Ct. 461 (1964).

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

UNITED STATES CONSTITUTION

AMENDMENT XIV

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES PROVIDE IN PERTINENT PART

TITLE 28 USC

§ 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any

Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

TITLE 42 USC

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This is the third time petitioner[2] has sought review in this Court in a seven year odyssey through federal and state courts seeking relief from discrimination which it has suffered from Cook County taxing officials in the assessment of its property for real estate tax purposes for years beginning in 1972.

Petitioner is the lessee under a 99 year lease of property in the Chicago Loop improved with an office building built in 1910. On January 1, 1974, it had a fair cash value of $800,000. Pursuant to applicable Illinois constitutional and statutory and Cook County ordinance provisions it was required to be assessed as of that date for 1974 taxes at 40% of fair cash value or $320,000 but was, however, assessed at $651,767. Property in the same class as petitioner's was assessed generally in Cook County at 40% of

[2] *28 East Jackson Enterprises, Inc.* v. *Cullerton*, 523 F.2d 439 (C.A. 7, 1975), cert. denied 423 U.S. 1073, rehearing denied 424 U.S. 959 (1976); Second Petition for Rehearing denied 551 F.2d 1093 (1976), cert. denied 434 U.S. 835 (1977).

fair cash value for 1974. Taxes of $81,454 were thus extended and levied against it rather than the legal amount of $39,991. As it had in earlier years, petitioner exhausted its administrative remedies seeking relief before the Assessor and Board of Appeals of Cook County but to no avail.

The only remedy at law available to petitioner in the state courts required petitioner to pay the full amount of taxes levied and to sue for refund. Because it lacked funds so to pay, petitioner could not avail itself of this remedy for any of the years in issue.

Having suffered from a discriminatory assessment in 1972, petitioner had sought injunctive relief in the District Court in a §1983 action alleging deprivation of federal rights of equal protection and due process. The District Court issued a preliminary injunction enjoining respondent officials from enforcing the lien of the tax levy by selling petitioner's property. The Court of Appeals reversed, *28 East Jackson Enterprises, Inc.* v. *Cullerton*, 523 F.2d 439 (1975). The Seventh Circuit (Swygert, J. dissenting in part) held, pg. 442, that it was reasonably certain the Illinois courts would grant injunctive relief to a taxpayer who lacked funds to avail itself of the statutory remedy and that 28 U.S.C. §1341 was a bar to federal jurisdiction. Accordingly, when its 1974 taxes were billed in 1975, petitioner filed a Complaint in the Circuit Court of Cook County seeking injunctive relief. That court denied relief and dismissed petitioner's complaint holding, *inter alia*, that inability to pay and thus to avail oneself of the statutory remedy did not afford a basis for equitable relief under Illinois law.

In its state court complaint for 1974 taxes, following the teaching of *England* v. *Louisiana Board of Medical Ex-*

aminers, 375 U.S. 411, and of *Mr. Boston Distiller Corp.* v. *Pallott,* 342 F.Supp. 770 (N.D. Fla. 1972), aff'd 469 F.2d 337 (C.A. 5, 1972), cert. denied 411 U.S. 967, petitioner made a reservation to preserve its right to seek District Court determination of its federal constitutional claims in the event the state court held against it. (The reservation formed no part of the *ratio decidendi* of the Chancellor.)

Immediately following its denial of injunctive relief, the State Court issued a temporary restraining order restraining sale of petitioner's property for 1974 taxes in order to permit it to seek injunctive relief in the District Court, there being no state equivalent of Rule 8 of the Federal Rules of Appellate Procedure authorizing injunctions pending appeal. Petitioner, accordingly, filed a §1983 action in the District Court alleging violation of its federal rights of equal protection and due process. That Court issued a preliminary injunction "to preserve the *status quo* • • • and in aid of our jurisdiction." App. 9 and, further,

> "(I)n order to protect our jurisdiction from being frustrated and because plaintiff has properly attempted to invoke our jurisdiction with a reasonable likelihood of ultimate success, a preliminary injunction should be entered in this case until plaintiff exhausts its rights of appeal in the State court action." App. 11.

Petitioner thereupon appealed the Chancellor's denial of injunctive relief to the Supreme Court of Illinois, advising that court that it was making a reservation under *England* to preserve its right to return to the District Court for adjudication of its federal constitutional claims should the Illinois court hold against it. The Illinois court held that the reservation would reduce the role of the

Illinois Supreme Court to that of a master in chancery to the District Court and render its opinion advisory. Constitutionally, the Illinois court held, it could not render such an opinion. It thereupon affirmed dismissal of the case. *28 East Jackson Enterprises, Inc.* v. *Rosewell,* 65 Ill. 2d 420, 425-6.

Respondents meanwhile appealed the District Court's grant of the preliminary injunction and while that appeal was pending in the Seventh Circuit appealed from the District Court's grant of an injunction the following year for 1975 taxes. The appeals 76-1305 and 77-1307 were consolidated.[3] The Court of Appeals reversed the preliminary injunctions and dismissed the complaints in its unpublished order, App. 1, which petitioner asks this Court to review. The Seventh Circuit held, App. 6, that petitioner "had no right in this context to make an *England* reservation, (and) the Illinois Supreme Court's refusal to rule based on that reservation does not prove that the state remedies are inadequate."

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[3] Although consolidated appeals are before this Court, the issues in 76-1305 are controlling and arguments and references will be to that case.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is in conflict with the rule expressed by the Fifth Circuit in *Mr. Boston Distiller Corp.* v. *Pallott*, 342 F.Supp. 770 (N.D. Fla. 1972), aff'd. 469 F.2d 337 (1972), cert. denied 411 U.S. 967 (1973). It creates a procedural impasse and effectively precludes litigants in state tax injunction proceedings from federal court determination of federal claims.

The decision of the Court of Appeals is in conflict with this Court's decision in *England* v. *Louisiana Board of Medical Examiners*, 375 U.S. 411.

ARGUMENT

I.

THE DECISION OF THE COURT BELOW CREATES A CONFLICT WITH THE RULE OF THE FIFTH CIRCUIT WITH RESPECT TO AN ENGLAND RESERVATION, PRECLUDES A FEDERAL COURT DETERMINATION OF FEDERAL CLAIMS IN TAX PROCEEDINGS AND CREATES A PROCEDURAL IMPASSE

Shorn of its procedural maze, the case at bar presents a patent conflict in the Circuits regarding the application of what the court in *England* v. *Louisiana Board of Medical Examiners*, 375 U.S. 411, held should be a line "bright and clear" so that litigants shunted from federal to state courts will not be exposed not only to unusual expense and delay but also to procedural traps operating to deprive them of their right to a District Court determination of their federal claims. 375 U.S. at 418. Petitioner respectfully submits that the issue it presents is a relatively simple one which might be decided in summary fashion.

As noted in the Statement of the Case, petitioner sustained an adverse decision in its 1972 real estate tax injunction proceeding in the Seventh Circuit, *28 East Jackson Enterprises, Inc.* v. *Cullerton*, 523 F.2d 439 (1975) which, reversing the District Court, held, with Swygert, J. dissenting in part, that 28 U.S.C. §1341 barred the federal action because it was reasonably certain that Illinois courts would grant injunctive relief to a taxpayer who lacked funds to avail itself of the sole remedy at law, viz., payment of the tax in full and suit for refund. 523 F.2d at 443. Suffering from the same unconstitutional, discriminatory assessment for 1974 petitioner followed the direction given by the Court of Appeals and commenced a proceeding in State court to enjoin respondents from selling its property for the lien of 1974 taxes.

Realizing that if it freely and without reservation submitted its federal as well as state claims for adjudication by the State court, the doctrine of res judicata would bar a District Court determination of its federal rights of equal protection and due process, *England, op cit*, pg. 419; *Autokefalos Orthodox Spiritual Church of Saint George, the Tropeophoros* v. *Hallahan*, 103 F.Supp. 389 (S.D.N.Y. 1952); *Roy* v. *Jones*, 484 F.2d 96 (C.A. 3, 1973); *Mr. Boston Distiller Corp.* v. *Pallott*, 342 F.Supp. 770 (N.D. Fla., 1972), aff'd. and rehearing and rehearing *en banc* denied 469 F.2d 337 (C.A. 5, 1972), cert. denied 411 U.S. 967 (1973), petitioner made an *England* reservation in its state court complaint, reserving to the federal courts the determination of its federal claims.

Petitioner had good reason for making its reservation. In *Mr. Boston, supra*, the plaintiff had proceeded initially in the Florida courts in a state tax declaratory judgment action. It did not seek review by this Court of an adverse decision of the Florida Supreme Court but filed an action

for declaratory and injunctive relief in the District Court. That Court dismissed holding:

> "As was noted previously the same federal constitutional questions raised in the instant complaint have been argued to and heard by the highest tribunal of the State of Florida. What plaintiffs seek to have this Court do is to convene a Three-Judge Court to exercise appellate review of a decision of the Florida Supreme Court. This the Court cannot do. (Citations omitted)
>
> Referring to *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed. 2d 440 (1964), this Court observes the following 'judge made rule':
>
> > '* * * We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forego his right to return to the District Court.' *Ibid.* at 419, 84 S.Ct. at 467.
>
> In accord, see *NAACP* v. *Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405, (1963).
>
> In the proceedings below, plaintiffs fully litigated their federal constitutional claims and exposed them to the state tribunals for adjudication without expressly reserving, should the state courts hold against them on the question of state law, the right to return to the District Court for disposition of their federal contentions. See *England, supra,* 375 U.S. at 421, 84 S.Ct. 461. Thus, it affirmatively appears that plaintiffs, in submitting their constitutional claims to the state courts, did so *unreservedly* with the express desire to have all claims there fully litigated. In such a procedural setting this cause should not be allowed to be relitigated in the United States District Court for obvious reasons:

> > '* * * Such a rule would not only countenance an unnecessary increase in the length and cost of the litigation; it would also be a potential source of friction between the state and federal judiciaries.' *England, supra,* at 419, 84 S.Ct. at 466.' " (Emphasis in original)
>
> 342 F.Supp. at 772.

In affirming, the Fifth Circuit, 469 F.2d at 338, recognized that federal jurisdiction was lacking not because the taxpayer had, as required by the Tax Injunction Act, initially sought relief in the state court, but because, as the court put it, the taxpayer had "unreservedly" presented its case to the state court.

> "After *unreservedly* presenting its case to the Florida courts, and losing (finally before the Florida Supreme Court), the corporation now resorts to the federal courts by this suit. At issue is whether the Tax Injunction Act, by confining appellant's initial choice of forum to the state courts, provides an exception to the doctrine of *res judicata* for a subsequent suit in federal court. Under the circumstances here we believe *res judicata* applies and prevents further consideration by us. Accordingly, the District Judge properly dismissed the case, 342 F.Supp. 770. *Autokefalos Orthodox Spiritual Church of Saint George, The Tropeophoros* v. *Hallahan,* S.D.N.Y. 1952, 103 F.Supp. 389; 1A Moore's Federal Practice ¶0.207 (1965)." (Emphasis Supplied)

It made no difference that the State court proceeding might precede that in the District Court. *Mr. Boston, supra; Roy* v. *Jones,* 484 F.2d 96 (C.A. 3 1973); *Jennings* v. *Caddo Parrish School Board,* 531 F.2d 1331 (C.A. 5 1976). In his concurring opinion in *Roy* v. *Jones,* Judge Aldisert stated:

> "I do not believe it is necessary to cut terminology so fine as to suggest that *England* only applies where

> the filing of the federal action precedes the state action. I find no magic in the 'right to return' expression in the opinion. The essence of the doctrine is as stated by Mr. Justice Brennan: '(W)e see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court.' 375 U.S. at 419, 84 S.Ct. at 466."

And, as the Court in *Jennings* held dismissing a civil rights action:

> "Appellant argues that she was forced to bring her constitutional claims in state court rather than proceed directly to federal court in order to avoid sacrificing judicial review of the school board's action pursuant to L.S.A.—R.S. 17:443. Under *England* v. *Louisiana State Board of Medical Examiners,* 1964, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440, however, had appellant wished to reserve her constitutional claims for subsequent litigation in federal court, she could have done so by making on the state record a reservation to the disposition of the entire case by the state courts. *Id.* at 421-22, 84 S.Ct. at 467-468, 11 L.Ed.2d at 448-49. Appellant expressed no such reservation in state court."

In the State court proceeding the Chancellor denied injunctive relief to petitioner on the basis of Illinois law, Order, App. 14, and thereafter dismissed the case. The reservation formed no part of his *ratio decidendi,* idem. However, since a sale of its property was imminent and, if held, would have made it impossible for any court to afford petitioner relief and, further, because Illinois has no counterpart to Rule 8 of the Federal Rules of Appellate Procedure, petitioner sought and the Chancellor entered a temporary restraining order to permit petitioner to file a District Court action. That Court granted a preliminary injunction, App. 8, to preserve the status quo, in aid of its jurisdiction and in order to prevent its jurisdiction from being frustrated, App. 9, 11, until petitioner exhausted its rights of appeal in the state action.

Petitioner thus found itself in a quasi-abstention situation. Although initially in the State court, it was required to seek the protection of the District Court pending its State court appeal. The District Court did not interfere with or interdict the State proceedings, *Huffman* v. *Pursue Ltd.,* 420 U.S. 592 (1975), and properly took jurisdiction of the cause.

As noted previously, on petitioner's appeal the Supreme Court of Illinois affirmed dismissal of the action because of the reservation, holding:

> "As we view this case, its determination in this court does not depend upon an analysis of the intimate details of the Federal abstention doctrines. Our concern centers upon whether, under the Constitution of Illinois, we may pass upon those questions of State law which the plaintiff has raised, including the question whether the complaint alleges a cause of action for injunctive relief. We conclude that we lack the authority to do so. As this case has been shaped, the role of the Illinois judicial system closely resembles that of a master in chancery for the Federal district court. Any judgment that an Illinois court might render would not definitively adjudicate the rights of anyone. It would be in the nature of an advisory opinion only. The Illinois Constitution does not vest this authority in its judges.
>
> The judgment of the circuit court of Cook County is affirmed."

28 *East Jackson Enterprises, Inc.* v. *Rosewell*, 65 Ill.2d 420, 425 (1976).[1]

Following the decision by the Illinois court and the denial of petitioner's second petition for rehearing in the earlier case, 551 F.2d 1093, the consolidated cases at issue in this petition were briefed, argued and decided.

As a result of the decision of the Court of Appeals of the Seventh Circuit, App. 1, conflicting if not contradictory rules, certainly at least of procedural law, appear in the federal system:

On the one hand we have a higher court in the case at bar holding, App. 6, that a litigant who in accordance with 28 U.S.C. §1341 seeks relief first in the state court has "* * * no right to make an *England* reservation * * *," because, as that court held in the earlier case 551 F.2d 1093, *England* was inapplicable because it presupposes proper invocation of federal jurisdiction in the first instance and plaintiff's initial complaint did not properly invoke federal jurisdiction because it was barred by Section 1341. 551 F.2d at 1096" App. 5. But this is a Catch 22 situation. If the State court affords an adequate remedy, §1341 is operative and there is, of course, no need for federal jurisdiction. If the State court denies relief upon an unreserved submission of federal claims along with state claims, §1341 is no longer operative but *res judicata* bars a federal trial of the federal issues thus thwarting federal jurisdiction and the clear intendment of §1341. It

[1] Although entered in the suit contesting the 1974 assessment, this decision of the Illinois court formed the basis for the Seventh Circuit's denial of petitioner's second petition for rehearing of its 1972 tax case. 551 F.2d 1093. The mandate in this earlier case, 523 F.2d 439, had been stayed pending the outcome of the State court appeal of the 1974 taxes at issue in the case at bar.

is the very denial of relief which lifts the bar of §1341 but drops the bar of *res judicata*!

On the other hand, we have the diametrically opposite rule of *Mr. Boston, supra,* which teaches that the Tax Injunction Act does not, by confining a litigant's initial choice of forum to the state courts, provide an exception to the doctrine of *res judicata* for a subsequent suit in the federal court; that it is the unreserved presentation of the federal issues to the state courts which allows the bar of *res judicata* to be operative, and that if he would go or return to the federal court he must make the reservation. 342 F. Supp. at 772, 469 F.2d at 338. See also *Jennings* v. *Caddo Parrish School Board*, 531 F.2d 1331, 1332 (C.A. 5, 1976).

The decision below turns on the point of the right *vel non* to make the reservation for the Court said:

> "This attack on the Illinois procedures turns on the question of whether the right to make an *England* reservation, initially given to litigants by the courts as a limit on equitable abstention, is included in Congress' statutory guarantee in Section 1341 of a plain, speedy and efficient remedy in state court. If a litigant does have the right to make an *England* reservation under Section 1341 as well as in equitable abstention, then the Illinois procedures may not provide an efficient remedy because they do not protect that right." App. 5

Accordingly, we respectfully request that this Court exercise its reviewing powers to resolve the conflict which besets petitioner and other litigants raising federal issues in state tax matters, matters which are becoming of increasing national importance and concern, doing so by holding that under the circumstances petitioner had the right to make an *England* reservation; that the declination of the Illinois court to rule on the merits rendered any State remedy inadequate, certainly not plain, speedy and efficient; and, therefore, that the bar of Section 1341 is removed.

II.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN ENGLAND v. LOUISIANA STATE BOARD OF MEDICAL EXAMINERS, 375 U.S. 411, AND PRECLUDES FEDERAL COURT RELIEF FOR FEDERAL CLAIMS.

Although this case is not one of classical abstention, nonetheless we argue that the teachings of *England* apply to it and the decision of the Court of Appeals is in conflict with *England*.

The Court below grounded its decision on, *inter alia*, the fact that petitioner's "initial complaint in the District Court did not properly invoke federal jurisdiction because it was barred by Section 1341. 551 F.2d at 1096" App. 5. We disagree with this holding. In the case at bar, unlike the 1972 tax case just cited by the Court of Appeals, petitioner went to the District Court after unsuccessfully seeking a state remedy from the Chancellor and while its appeal to the higher Illinois courts was pending.[5] With no procedure which admitted of an injunction pending appeal available in the State courts, petitioner properly sought and the District Court properly took jurisdiction. In fact, the State Chancellor issued a temporary restraining order against respondents to permit petitioner to go to the federal court and the District judge was so informed. App. 8.

At the time the District Court took jurisdiction and enjoined respondents, petitioner was appealing the Chancellor's denial of relief and dismissal of its complaint to the Illinois Supreme Court. It is clear that petitioner might then have eschewed its reservation and freely submitted

[5] Initially petitioner appealed to the Appellate Court of Illinois. The case was removed on grounds of importance to the Supreme Court under the latter's Rule 302.

its federal as well as State equal protection and due process claims to that court. It is equally as clear that if it had and that court had held against it on either the State or the federal claim or on both, in no way could petitioner have returned to the District Court for a trial of the federal issues. This Court has said so:

> "We implicitly rejected such a rule in *Button* (*NAACP* v. *Button*, 371 U.S. 415) when we stated that a party elects to forego his right to return to the District Court by a decision 'to seek a complete and final adjudication of his rights in the state courts.' We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by state courts, litigates them there and has them decided there, then—whether or not he seeks direct review of the State decision in this Court—he has elected to forego his right to return to the District Court." *England* at 419.

Petitioner was thus bound by the rule of *England* and a plethora of other cases imposing the bar of *res judicata* against reassertion of federal claims after losing in state courts. If petitioner was so bound, should it not receive the benefit of *England* as well as the burden? Should not the "line drawn bright and clear", 375 U.S. 418, by this Court apply to a litigant such as petitioner shunted from federal to state courts and back again to federal court? It was the Court of Appeals in 523 F.2d 439 which shunted petitioner to state court, holding, with a dissent in part, that it was reasonably certain Illinois courts would provide injunctive relief for a taxpayer without funds to avail itself of the statutory remedy, 523 F.2d at 443, notwithstanding that no case in the then 36 year history of the 1939 Illinois Revenue Code has so held.

When, following this decision, petitioner's suit at bar was filed in the Circuit Court of Cook County, the State Chan-

cellor denied it injunctive relief on State grounds without reaching the constitutional issues, App. 14, and out of concern for petitioner's rights shunted it to the District Court. That Court, guided by Section 1341, *Huffman* v. *Pursue Ltd.*, 420 U.S. 592, *Judice* v. *Vail*, 430 U.S. 327, and principles of comity, refrained from entering a permanent injunction and deferred to the State Court handling petitioner's appeal. That Court refused to decide the case because petitioner followed what it believed to be this Court's bright and clear line in *England* and reserved its feneral rights which include the right to a federal forum at *nisi prius* to vindicate federal constitutional claims.

Moreover, the *England* Court predicted that there would be situations like the one at bar, stating:

> "And if the State court has declined to decide the state question because of the litigant's refusal to submit without reservation the federal question as well, the District Court will have no alternative but to vacate its order of abstention." 375 U.S. 411, n.12.

Illinois is not alone in declining to share the abstention doctrine's purpose of furthering the harmonious relation between state and federal authority. *Cf. United Services Life Insurance Co.* v. *Delaney*, 396 S.W.2d 855 (Tex. 1965) Should rights of litigants in the federal courts in these states be abridged because of their legal idiosyncracies? While litigants in other states which "share the abstention doctrine's purpose * * *" may make an *England* reservation secure in the knowledge that a state court decision will be forthcoming and that they can then go to the District Court for a trial on their federal claims should the state court hold against them.

The decision of the Court of Appeals abets the policy of the Illinois court effectively depriving the citizens of

this District of a federal forum for vindication of important federal rights in local tax matters. For if the rule of this case is permitted to stand, no taxpayer can pursue a remedy in an Illinois court and reserve his federal claims —he won't get a decision. Therefore, he must unreservedly submit them and whether they are addressed or not by the court the bar of *res judicata* applies leaving the litigant only with recourse to this Court. However, as Justice Brennan said in *England:*

> "But such review, even when available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute for the initial District Court determination * * * to which the litigant is entitled in the federal courts." 375 U.S. at 416.

The effect of the rule of the case at bar is thus effectively to preclude federal injunctive tax relief for any litigant who must first seek to remove the bar of §1341 by litigating his claims in the State court.

CONCLUSION

We therefore submit that the refusal of the Illinois court to rule on petitioner's case in 65 Ill.2d 420 renders whatever remedy may exist in the state courts, if in fact one does exist, an inadequate one; certainly one that is not plain, speedy and efficient. Accordingly, the Court of Appeals erred in holding that §1341 barred the instant action, which holding petitioner respectfully prays this Court review and reverse.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Argued January 23, 1978
May 15, 1978

Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

(Unpublished Order Not To Be Cited Per Circuit Rule 35)

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28 EAST JACKSON ENTERPRISES, INC.,
Plaintiff-Appellee,

Nos. 76-1305, 77-1307 vs.

EDWARD J. ROSEWELL, Etc., et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 76 C-342, 77 C-149 — Thomas R. McMillen, Judge.

ORDER

In 1976, plaintiff filed a complaint against three county officials[1] attacking their 1974 assessment of real estate taxes on plaintiff's 19-story office building at 28 East Jackson Boulevard in Chicago and the ground thereunder.

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[1] The Treasurer of Cook County, the Assessor of Cook County, and the former Assessor of Cook County.

Under the long-term ground leases with the realty owner, plaintiff was obligated to pay the real estate taxes levied against the property. According to the plaintiff, defendants' discriminatory assessment of this property has deprived it of property without due process of law and in contravention of the Equal Protection Clause of the Fourteenth Amendment. The suit was brought under the Civil Rights Act (42 U.S.C. § 1983), and plaintiff requested a declaration that all 1974 real estate taxes levied against the property in excess of $28,000 were unconstitutional. Injunctive relief was also sought against the sale of the property for the illegal taxes, and plaintiff demanded $54,000 from defendants, "being the difference between the amount of taxes on plaintiff's property illegally and unconstitutionally assessed and levied and the amount of taxes which would have been levied had all property in Cook County been legally assessed." Compensatory and punitive damages of $900,000 were also sought if plaintiff's property should be sold because of defendants' acts. The district court granted plaintiff a preliminary injunction preventing defendants from selling the property for taxes "until the plaintiff has exhausted or abandoned its remedy in the State court."

A companion complaint was filed with respect to 1975 taxes seeking the same relief as in the earlier complaint except that the punitive damages claimed were reduced to $500,000. In the second case the district judge enjoined defendants from selling this property for real estate taxes until further order of the court. The appeals from the two preliminary injunctions were consolidated for our consideration.

This appeal is part of a series of lawsuits filed by the plaintiff that object to the assessment of its property. A federal suit involving plaintiff's 1972 and 1973 assess-

ments was dismissed by this Court on the basis of 28 U.S.C. § 1341 in *28 East Jackson Enterprises, Inc.* v. *Cullerton*, 523 F.2d 439 (1975), certiorari denied, 423 U.S. 1073, rehearing denied, 551 F.2d 1093 (1977), certiorari denied, 46 LW 3216. With respect to the 1974 taxes at issue here, in accordance with the district judge's suggestion, plaintiff appealed an adverse decision of the Circuit Court of Cook County to the Illinois Supreme Court which declined to interfere. *28 East Jackson Enterprises, Inc.* v. *Rosewell*, 65 Ill.2d 420 (1976).[2] Plaintiff brought no action with respect to the 1975 taxes in state court on the ground that "there is no [state] case under the Revenue Act of 1939 granting injunctive relief under state equity or state or federal constitutional principles except when the tax is on exempt property or unauthorized. An excessive assessment does not render the tax unauthorized." (Br. 23)

Both parties agree that the pivotal question on this appeal[3] is whether the Illinois procedures available to plaintiff are "plain, speedy and efficient" remedies and therefore deprive the federal courts of jurisdiction to enjoin the assessment, levy or collection of the tax under

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[2] The Illinois Supreme Court's ruling was the basis for plaintiff's petition for rehearing discussed at 551 F.2d 1093. Although the Supreme Court's ruling covered only 1974 taxes, plaintiff also filed state suits involving the 1972 and 1973 assessments. Those suits apparently were continued pending the state Supreme Court's ruling and were dismissed when that case was resolved adversely to plaintiff. 551 F.2d at 1094 n. 3.

[3] Plaintiff also argued in its brief, that its request for tort damages against defendants is not within the bar of Section 1341. As the panel decided in the previous *28 East Jackson* case, however, given the nature of plaintiff's complaint it is immaterial that plaintiff also requested damages and a declaratory judgment. 523 F.2d at 440-441 n. 2.

28 U.S.C. § 1341.[4] Plaintiff offers two reasons why the state procedures provide uncertain relief at best. Its first argument, that the state courts will not entertain a suit for equitable relief in this context, cannot prevail because it was rejected by a panel of this Court in the case involving plaintiff's 1972 and 1973 assessments. 523 F.2d at 439. Plaintiff points to no case or event since that ruling to refute the panel's finding that the Illinois procedures are adequate based on its reliance on the Illinois Supreme Court's statement that "there will be cases of fraudulently excessive assessments where the remedy at law will not be adequate and injunctive relief should then be available." *Clarendon Associates* v. *Korzen*, 56 Ill.2d 101, 108 (1973) quoted in 523 F.2d at 441.

Plaintiff's second objection to the Illinois procedures stems from its attempt in state court to enjoin the sale of its property for failure to pay taxes for 1974. In that case, plaintiff informed the state courts that pursuant to *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, it was reserving solely to the federal courts the adjudication of its rights under the Constitution and laws of the United States. 65 Ill. 2d at 425. As a result of that reservation, the Illinois Supreme Court concluded that it lacked the authority to determine whether the complaint alleged a cause of action for injunctive relief because to decide that issue would be to offer an advisory

[4] 28 U.S.C. § 1341 provides:

"Taxes by States

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

opinion. 65 Ill.2d at 425.[5] Based on that refusal to rule, plaintiff insists that whatever procedures may be available in theory, no adequate relief is available on the facts of this case.

This attack on the Illinois procedures turns on the question of whether the right to make an *England* reservation, initially given to litigants by the courts as a limit on equitable abstention, is included in Congress' statutory guarantee in Section 1341 of a plain, speedy and efficient remedy in state court. If a litigant does have the right to make an *England* reservation under Section 1341 as well as in equitable abstention, then the Illinois procedures may not provide an efficient remedy because they do not protect that right. On rehearing in the previous *28 East Jackson* case, a panel of this Court rejected the same argument by the same plaintiff based on the same Illinois Supreme Court decision, reasoning that *England* was inapplicable because *England* presupposes proper invocation of federal jurisdiction in the first instance and plaintiff's initial complaint did not properly invoke federal jurisdiction because it was barred by Section 1341. 551 F.2d at 1096.[6] Because plain-

[5] Although it held that the Illinois judges had no authority to rule on plaintiff's claims, rather than dismissing the case the Supreme Court affirmed the judgment of the Circuit Court of Cook County. 65 Ill.2d at 426.

[6] Because this Court's previous opinions establish that Illinois remedies are plain, speedy and efficient, we need not decide whether the Illinois Supreme Court's ruling on plaintiff's state claim, which was filed and decided before this federal claim, is *res judicata* as to plaintiff's 1974 taxes despite plaintiff's purported *England* reservation. See generally *Mr. Boston Distiller Corp.* v. *Pallot*, 469 F.2d 337 (5th Cir. 1972), certiorari denied, 411 U.S. 967; *Roy* v. *Jones*,

(footnote continued)

tiff under the controlling precedent therefore had no right in this context to make an *England* reservation, the Illinois Supreme Court's refusal to rule based on that reservation does not prove that the state remedies are inadequate.

Regardless of sympathy for plaintiff's plight, our 1977 decision in the case involving plaintiff's 1972-1973 taxes is controlling. Therefore, the instant cases are remanded to the district court with instructions to lift the preliminary injunctions and dismiss the complaints.

(footnote continued)

484 F.2d 96 (3d Cir. 1973). Plaintiff insists that *Mr. Boston,* in which a taxpayer was denied federal relief based on *res judicata* after "unreservedly presenting its case to the [state] courts" and losing in that forum, is in conflict with this Court's opinion on rehearing in the previous *28 East Jackson* case. Apparently the claimed conflict is based on the Fifth Circuit's use of the word "unreservedly" in describing the facts of that case; the implication plaintiff would have us draw is that if the taxpayer had presented the claim "reservedly" as plaintiff did here, the Fifth Circuit would not have applied *res judicata* and assertedly also would have accepted the taxpayer's *England* reservation. In our view, such potential implications from dictum in an opinion that was on the books when the previous panel of this Court rendered its decision are not by themselves a basis for departing from the decision of the previous panel.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

June 28, 1978.

Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

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28 EAST JACKSON ENTERPRISES, INC.,
Plaintiff-Appellee,

Nos. 76-1305, 77-1307 vs.

EDWARD J. ROSEWELL, Etc., et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 76 C-342, 77 C-149 — Thomas R. McMillen, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellee, 28 East Jackson Enterprises, Inc., no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

28 EAST JACKSON ENTERPRISES, INC.,

Plaintiff,

v.

EDWARD J. ROSEWELL, County Treasurer and Ex-Officio County Collector of Cook County, Illinois, et al.,

Defendants.

NO. 76 C 342

DECISION ON PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

On February 4, 1976, plaintiff filed a motion for a Temporary Restraining Order which was granted, enjoining the defendant County Collector of Cook County from selling its property for 1974 Real Estate Taxes. This order was concurrent with one entered by the Circuit Court of Cook County on January 22, 1976 which expired on February 6, 1976. Sometime after that, an order denying plaintiff's motion for preliminary injunction will presumably be consummated by a dismissal of the State court action, as recited in par. 1 of the State court's conclusions.

The reason for the entry of a temporary restraining order by the State court was to afford the plaintiff an opportunity to seek relief in the Federal court. The plaintiff's motion herein for a preliminary injunction is therefore pursuant to the accommodation granted by the State court in entering the temporary restraining order. That order was not an expression by the State court of any jurisdiction over the complaint.

Defendants resist the entry of a preliminary injunction primarily on the basis of *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). In that case, the Supreme Court ruled that this court should not interfere with State court proceedings to abate a nuisance except in the exceptional circumstances left open with respect to criminal cases in *Younger* v. *Harris*, 401 U.S. 37 (1971). The court did not preclude recourse to a Federal court to redress alleged violations of the Federal constitution but made it clear that an injunction should not be entered until the petitioner had exhausted his State court remedy (420 U.S. at 610-611). The petitioner in *Huffman* had sought and obtained a permanent injunction against the enforcement of the State court judgment, but Federal relief was denied because, *inter alia*, the petitioner had not appealed from that judgment and it had become final without exhaustion of an appeal.

In the case at bar, the plaintiff has not abandoned its State court appeal and in fact has not yet obtained a final judgment from which it could appeal. Therefore, a permanent injunction should not be considered at this time. On the other hand, since the plaintiff alleges that no supersedeas can be obtained pending appeal from a State court dismissal of his case, the property in question would be sold for taxes and the plaintiff's remedy both in the State court and in this court would be frustrated, according to pars. 9, 10 and 12 of his motion for temporary restraining order. Thus a preliminary injunction is appropriate in order to preserve the *status quo*, if plaintiff has a reasonable probability of ultimate success, and in aid of our jurisdiction.

In a related case involving the same property, our Court of Appeals held that a preliminary injunction should not

have been issued with respect to the collection of the 1972 Real Estate taxes and sale of plaintiff's property for non-payment thereof, because the plaintiff had a plain, speedy and efficient remedy in the State courts within the meaning of 28 U.S.C. §1341. *28 East Jackson Enterprises Inc.* v. *Cullerton et al.*, 523 F.2d 439 (7th Cir. 1975). The court relied upon certain recent decisions of the Illinois Supreme Court which indicated that equitable relief might be available to the taxpayer in the State court, e.g. *Hoyne Savings & Loan Association* v. *Hare*, 60 Ill. 2d 84 (1974), and *Exchange National Bank* v. *Cullerton*, 17 Ill. App. 3d 392 (1st Dist. 1974). The Court of Appeals concluded at 523 F.2d p. 442:

> We recognize that if the adequacy of a state remedy is uncertain, section 1341 does not divest the federal courts of jurisdiction. *Hillsborough* v. *Cromwell*, 326 U.S. 620, 625-26, 66 S.Ct. 445, 90 L. Ed. 358 (1946). But we believe that it is reasonably certain that Illinois courts would entertain a suit for injunction when a taxpayer establishes that he lacks the funds to comply with the statutory remedy of payment under protest. Under such circumstances, the principles of comity and restraint embodied in section 1341 require that plaintiff first seek equitable relief in the Illinois courts.

Circuit Judge Swygert in his dissent did not disagree with the legal conclusion reached by the majority but believed that the plaintiff should have exhausted its State court remedy before any injunction were considered. This in substance is consistent with the opinion in *Huffman* v. *Pursue, Ltd.*, supra p. 2.

Plaintiff in the case at bar is apparently attempting to remedy the deficiency which caused the reversal in its prior case and simultaneously attempting to comply with the

requirement which Justice Rehnquist and Circuit Judge Swygert suggested as a condition precedent for invoking the equitable jurisdiction of this court. However, if plaintiff is not permitted to exhaust its State court remedy by an appeal before its property is sold for taxes, then the remedy in the case at bar becomes ineffectual. In order to protect our jurisdiction from being frustrated and because plaintiff has properly attempted to invoke our jurisdiction with a reasonable likelihood of ultimate success, a preliminary injunction should be entered in this case until the plaintiff exhausts its rights of appeal in the State court action. 28 U.S.C. §2283. If plaintiff abandons that action without an appeal, then the requirements of *Huffman* v. *Pursue, Ltd.* will not have been satisfied. If it is successful in an appeal, then resort to this court may be rendered unnecessary. If plaintiff is unsuccessful in its appeal, then this court must decide whether or not the plaintiff has in fact been accorded a plain, speedy and efficient remedy in the State court and, if not, whether its constitutional rights have been violated and permanent relief against the defendants may be justified.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendants are preliminarily enjoined from selling the plaintiff's property designated as Permanent Index Nos. 17 15104 020 and -021 in order to pay its 1974 Real Estate taxes, until the plaintiff has exhausted or abandoned its remedy in the State court.

ENTER:

Thomas R. McMillen

JUDGE, U. S. DISTRICT COURT

DATED: Feb. 12, 1976

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

28 EAST JACKSON ENTERPRISES, INC.,
Plaintiff,

v.

EDWARD J. ROSEWELL, COUNTY TREASURER AND EX-OFFICIO COUNTY COLLECTOR OF COOK COUNTY, ILLINOIS, AND THOMAS M. TULLY, INDIVIDUALLY AND AS ASSESSOR OF COOK COUNTY,
Defendants.

NO. 77 C 149

PRELIMINARY INJUNCTION

This cause coming on upon motion of plaintiff, 28 East Jackson Enterprises, Inc., for a preliminary injunction to enjoin the defendant Rosewell from selling plaintiff's real estate for 1975 taxes, the Court, having considered the pleadings and arguments of counsel and being advised in the matter, finds:

1. The issues are substantially the same as those in cases No. 73 C 2876, 74 C 3509 and 76 C 342. In those cases, this Court held that jurisdiction lay under 28 U.S.C. §1343 (3) and 42 U.S.C. §1983, and that 28 U.S.C. §1341 was not a bar to the issuance of preliminary injunctions because plaintiff did not have a plain, speedy and efficient remedy in the state courts.

2. Plaintiff has no adequate remedy at law and there is no plain, speedy and efficient remedy now available to plaintiff in the state courts; and §1341 is not a bar. This Court has jurisdiction of the parties and subject matter.

3. If plaintiff's property is sold for 1975 taxes, it will make it impossible for this Court to grant any relief to plaintiff should it be found entitled thereto upon a trial of the cause.

4. The effect of a preliminary injunction on the public bodies levying the taxes is slight, plaintiff's taxes being less than .008% of the total taxes levied in Cook County; conversely, denial of a preliminary injunction will occasion irreparable loss to plaintiff.

5. Maladministration of tax laws, alleged by plaintiff and supported by proof in the earlier proceedings, is contrary to the public interest.

6. The jurisdictional aspects of this case will be determined by a decision in the appeal of No. 73 C 2876 now before the Court of Appeals on a Second Petition for Rehearing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendant, Edward J. Rosewell, individually and as Treasurer and Ex-Officio County Collector of Cook County, is enjoined from selling plaintiff's property designated as Permanent Index Nos. 17-15-104-020 and 17-15-104-021 for 1975 real estate taxes until further order of this Court.

Dated: Jan 20 1977

ENTER:

Thomas R. McMillen
JUDGE

Approved as to form only:
Illegible
Assistant State's Attorney

James L. Fox
33 North Dearborn Street
Chicago, Illinois 60602
FInancial 6-8370

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

No. 76 CH 14

28 EAST JACKSON ENTERPRISES, INC.,

Plaintiff,

v.

EDWARD J. ROSEWELL, County Treasurer and ex-officio County Collector of Cook County, Illinois,

Defendant.

ORDER DENYING PRELIMINARY INJUNCTION

This cause coming on upon plaintiff's Motion for a Preliminary Injunction and the Court having jurisdiction of the parties and subject matter, the defendant having notice thereof and being represented by counsel; and

The Court having considered the Motion, the allegations of the verified Complaint and the arguments of counsel and having been informed in the premises, finds:

FINDINGS

1. It has jurisdiction of the parties and of the subject matter.

2. The overvaluation alleged in the Complaint is not of the extent required to render the application of the *Clarendon* and *Hayne*[1] cases to this particular piece of property.

3. The allegations of inability to pay taxes do not afford a basis for equitable relief under Illinois law.

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[1] *Clarendon Associates* v. *Korzen*, 56 Ill.2d 95 (1974), *Hoyne Savings & Loan Association* v. *Hare*, 60 Ill.2d 84 (1974).

CONCLUSIONS

1. This Court concludes that as a matter of law plaintiff's Complaint does not state a cause of action under Illinois law and, upon a motion to dismiss filed against it, the Complaint would be dismissed.

2. No preliminary injunction may enter as the entry of such an injunction would be contrary to the law of this State.

ORDER

It Is Therefore Ordered that plaintiff's Motion for a preliminary injunction be denied.
Dated: Jan. 22, 1976

Enter:

/s/ Walter P. Dahl
Judge

Moses, Gibbons, Abramson & Fox
33 North Dearborn Street
Chicago, Illinois 60602
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